No. 145.

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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

NO. 145.

WM. A. CLARK,

Plaintiff in Error.

vs.

WM. F. FITZGERALD, ET AL.

Defendant.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

ROBERT B. SMITH, and
ROBERT L. WORD.
Solicitors and Attorneys for Plaintiff in Error.

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ARGUMENT.

Since preparing our brief upon the case in chief, we have been served with a notice of motion to dismiss the appeal upon the ground that the record does not present to this Court a federal question for deter-

mination, and the defendants in error in their brief allege several reasons for their position. It is true as stated in the brief of defendants in error, that there is no bill of exceptions in this record, but because there was no bill of exceptions is no reason why the question may not be properly raised and presented in some other form in the record.

Counsel in their argument admit that the question which it is sought to have the Court determine by this appeal is an important and vexed question, and that it should have been determined ere this, yet they are not now willing to have the Court determine the question, but prefer that the Court should further postpone the evil day by dismissing this ecord, alleging as they do, that the record does not raise any question of federal jurisdiction.

In their brief, Counsel for defendants in error make a serious mistake; they make the statement that the Supreme Court of the United States will not look to any part of the record except the pleadings to ascertain whether or not a federal question is raised. Such doctrine, we do not believe, will be sanctioned by this Court. If it appears in any part of the record legitimately before this tribunal, that a federal question is raised, then the jurisdiction of this Court is complete, and upon this, we cite the following authorities:

Exparte Smith, 94 U. S. 455.
Kempe vs. Kennedy, 5 Cranch 173.
Goodenough Mining Co. vs. Rhode Island Mfg. Co. 24 Cal. 368.
Stevens vs. Nichols, 130 U. S. 230.
Chapman vs. Barney, 129 U. S. 677.
Cameron vs. Hodges, 127 U. S. 322.
Anderson vs. Watt, 138 U. S. 644.
Continental Insurance Co. vs. Rhoads, 119 U. S. 237.
Peper vs. Fordyce, 119 U. S. 469.
Johnson vs. Christiansen, 125 U. S. 642.

In Exparte Smith, 94 U. S. 455, the Court says:

"The facts upon which the jurisdiction of the Courts of the United States rests *must in some form appear in the record* of all actions prosecuted before them, and the doctrine there announced is repeated so often, that it is wholly unnecessary to cite further authorities."

In determining whether a federal question is raised this Court will look at the whole record, including the opinion of the Supreme Court of Montana, and will not eliminate that opinion in considering the matters presented.

Counsel for the defendants concede in their brief, that if a federal question is raised by the pleadings in the cause, that in that event it is presented in such shape that this Court will be compelled to take cognizance of that fact. Without assenting to their con-

tention that the federal question must be raised in the pleadings only. We will attempt, for the sake of argument, to show that such a question is squarely raised by the pleadings in this case, and we will further show by the printed record before you, that the Supreme Court of Montana, passing upon and construing the pleadings in this case, concede that a federal question is raised in said pleadings.

Counsel for defendants in error further state in their brief on this motion as follows:

"It is possibly true that this issue (meaning the extralateral rights of the defendants in error) was tendered by the pleadings, but there is nothing in the record to show what view was taken of the question by the Court which tried the case."

Here is a practical confession that the pleadings did raise the question, then taking the opinion of the Supreme Court of Montana as set forth in the printed record covering 21 pages thereof, discussing singly and solely the question as to whether or not the defendants have the right to follow their vein on its dip into the earth, and underneath the "Black Rock" claim, how can it be contended that a federal question is not raised in this Court? If a federal question was not presented to the Supreme Court of Montana, then all its labor and research in preparing and expounding their view of the law was wholly useless, for they do not attempt to place their decision upon any other

ground than a construction of section 2322 of the Rev. Stats. of the United States. On page 19 of the printed record, the Supreme Court of Montana, referring to the question whether a federal question was presented in the pleadings in this cause for adjudication, uses this language:

"In other words the "Black Rock" contends that under that decision (meaning the Amy & Silversmith case) if the "Niagara" apex leaves the "Niagara" claim through a side line as it does, the "Niagara" is limited in following down the dip of the vein to a perpendicular plane, drawn downward through that side line, the line H. B. on the diagram, whereas the District Court did not so limit them, but held in its judgment that the "Niagara" could take the ore on the dip of the vein under the apex A. E. and east of the point A., although such vein on its dip extended southward under the "Black Rock" north side line, that is to say, the District Court gave judgment in accordance with the law of the Amy & Silversmith case in the 9th Montana which was declared not to be the law in the Amy & Silversmith case in 152 U. S. *We will concede to the "Black Rock" that this question is raised by the pleadings*, and we shall proceed to determine whether the "Niagara" or the "Black Rock" owns the ore in dispute taken from the place marked "ore bodies" on the diagram on page 16 of the printed record."

This quotation disposes of so much of the defendants' brief as contends that there is nothing in the record to show which way the Trial Court ruled on the trial of this cause, for the Supreme Court in passing upon the question distinctly asserts that the Trial Court gave to the claimants of the "Niagara" the right to follow their vein on its dip, contrary to the rule laid down in the Amy & Silversmith case, 152 U. S.

If our contention is correct that the pleadiugs raised this issue, then it was impossible for the Court below to have rendered judgment for the defendants in error, because the ore extracted was outside and beyond the surface lines of the "Niagara," and at the point designated as "ore bodies" on the diagram page 17 of the printed record used by the Supreme Court of the State.

Counsel for the defendants do not seem to realize that when a question is raised by the pleadings or the judgment roll in any case, it may be reviewed by any Superior Court upon proper appeal or writ of error without any form of exception. It is enough to show simply that upon the judgment roll the decision or judgment should be different, and it was not necessary to take an exception to the entering of judgment in the lower Court. This Court will undoubtedly follow the decision of the Supreme Court of Montana upon a question as to what is raised or pre-

sented in the record of a case tried in the State Court. That Court is the highest and best authority for the construction of pleadings and questions of practice in the State Courts, and when that Court has construed such a question, this Court will undoubtedly follow its construction.

This principle is so well established that it does not here require a citation of authorities, and the Supreme Court of Montana having determined that a federal question was properly raised in the pleadings in this case, it would not seem necessary to further elucidate the question as to what was raised, or is raised by the pleadings.

The authority cited by defendants' Counsel, that no question can be reviewed on appeal or error without an objection or exception having been taken in the Trial Court, is undoubtedly true so far as it relates to the method of procedure during the course of the trial, or the matters of practice not presented in the judgment roll, but there never has perhaps been any doubt upon the doctrine, that you can raise in any Court of appeal any question presented by the judgment roll, regardless of whether or not an exception was taken.

So strongly intrenched is this doctrine in the laws of Montana, that the Legislature has enacted by section 1151 of the Code of Civil Procedure. that no

bill of exceptions is required to the following matters:

"The verdict of the jury, the instructions and "charge of the court; the final decision of an action "or proceeding; an interlocutory order and decision "finally determining the rights of the party or some "of them; an order or decision from which an appeal "may be taken, an order sustaining or over-ruling a "demurrer, allowing or refusing to allow an amend-"ment to a pleading, striking out a pleading or a por-"tion thereof, refusing a continuance; an order made "upon an exparte application; an order or decision "made in the absence of the party are deemed to have "been excepted to, and no bill of exceptions is re-"quired."

Why is it then in view of this Statute, and in view of the opinion of the Supreme Court of Montana as shown in this record, that Counsel insist that we cannot review any question here which is raised by the judgment roll in the cause, nor are we precluded from relying upon the opinion of the Supreme Court of Montana to determine what questions are raised. That opinion is a part of this record; it is to reverse that opinion and that judgment, that this writ of error is prosecuted, and if facts appear in that opinion (it being a part of the record before this Court) which show that a federal question was raised, or is raised by this record, we are entitled to the benefit of such

showing in determining what questions are presented. It matters not in what part of the record the jurisdictional facts appear, if they appear anywhere, either by affidavit, the pleadings, petition for removal, judgment of the Court, or in any other legitimate way properly presented to this Court, then the Court will not dismiss the writ of error. But in order that you may see that the question is squarely raised by the pleadings, we quote as follows, beginning on page 2 of the printed record of the amended complaint:

"That the said "Niagara" lode claim is a quartz "lode claim, and as such embraces a quartz vein, the "top or apex of which crosses the south line of the ""Niagara" lode claim 560 ft. in a westerly direction "from the north east corner No. 1 of the "Black "Rock" lode claim, said south line of the "Niagara" "lode and the north line of the "Black Rock" "lode at the point of departure of said vein "being identical; and the said vein from the said "point of entering the south line of the said "Nia-"gara" lode continues with its top or apex within "the surface lines of the "Niagara" claim easterly "until it crosses the east end line of the said "Nia-"gara" lode claim, and that the said vein in its down-"ward course or dip departs from the surface lines of "the said "Niagara" lode into and under the "Black "Rock" lode, which lies south of and adjoining the ""Niagara" lode. * * *

"That heretofore, to-wit, on or about the first day "of March, 1890, the said defendants without plain- "tiff's consent, by underground workings, levels, "winzes, stopes and shafts entered upon said vein "upon its downward course or dip, began to extract, "and ever since have continued to extract, and are "now extracting large quantities of ore, which ore "was extracted from the vein hereinbefore described "upon its downward course or dip, and on that por- "tion which had its apex upon the "Niagara" lode "claim."

This is the statement of the facts as presented in the amended complaint. Now the answer states the facts as follows:

"Defendant further answering avers the fact to be "that said "Niagara" lode claim was not located on "or along the course or strike of any vein, the top "or apex of which lies within the lines of said lode "claim, but was located across said vein and across "the vein from which plaintiffs claim that defend- "ants have extracted ore belonging to plaintiff, "and that by reason thereof, the side lines of said ""Niagara" lode claim became and are the end "lines of said lode claim, and should be drawn "down vertically, and for the reason that said "side lines became the end lines of said lode claim, "plaintiffs have no right, in case said veins or any of "them should, upon their downward course or dip,

"depart from the side lines of said "Niagara" lode "claim, and under or into the "Black Rock" lode "claim, to follow the same in said downward course "or dip into or under the side line of said "Black "Rock" claim. * * *

"Denies that said plaintiffs, or any of them, as own- "ers or otherwise, were or are entitled to the vein or "lode upon which the alleged trespass was committed, "or are entitled to the same in its downward course "outside of the side planes of the surface location of "said "Niagara" lode claim, drawn down vertically, "or are entitled to any part or portion of the ore of "said vein outside of the surface lines of said "Nia- "gara" lode claim, and especially that portion from "which it is alleged the said quartz and ore was taken "by the defendants in this action." * * *

"That at, and before, and continually during the "time of the alleged trespass, this defendant had and "held a lease from all the other defendants in this ac- "tion to their right, title and interest in, and to said ""Black Rock" lode claim with all the veins, lodes "and ledges, the tops or apexes of which were with- "in the lines of said "Black Rock" lode claim, and "rights, easements and privileges thereto lawfully be- "longing, that as such lessee this defendant went in- "to the actual possession of said "Black Rock" lode "claim and did manage, mine and conduct said "Black "Rock" lode claim during all the time of the alleged

"trespass, set out in the plaintiffs' complaint, and has "before the commencement of this suit, and before "the time of the supposed trespass mentioned in said "complaint, continually as such lessee mined and ex- "tracted quartz and ore from said "Black Rock" lode "claim, and particularly the quartz and ore mention- "ed in said complaint."

This statement in the answer, that the ore taken by the plaintiff in error was taken from the "Back Rock" lode claim is not denied in the replication. The replication simply denies that, that vein from which the ore was taken had its top or apex in the "Black Rock" claim, thus the Court will see that from the exact language of the pleadings, there can be no doubt that the construction of section 2322 of the Rev. Stats. of the United States is squarely put in issue, and our contention that such issue and construction of such statute was raised by the pleadings is conceded in the opinion of the Supreme Court of Montana, page 19 of the printed record. That this question is important and should be passed upon and determined by this tribunal is admitted on all sides. Litigation involving the same question which we ask this Court to determine now, will be multiplied and augmented by further delaying or putting off the evil day.

If this question had been determined by this tribunal when it was first presented to it in the Tyler and

Last Chance case, this writ of error would not have been necessary. It must be met sooner or later, and we do not believe it was the intention of the framers of Constitutional Government in this country that the Supreme Court of the United States should refuse to determine proper questions presented to it, or postpone their determination to a later day. Justice to litigants demands that this tribunal should determine at the first opportunity every legitimate question properly presented.

If the Court desires further to postpone the decision of this question, it may be able to sustain this motion to dismiss this writ, but if it shall determine that the question ought to be decided, and at the earliest day practicable, it will find ample warrant and authority in this record for saying and holding with the Supreme Court of Montana that the question is raised in the pleadings, and not only is it raised in the pleadings, but it is forcibly presented as the sole question in the opinion of the Supreme Court of the State, and it is to reverse that decision, and to establish the right doctrine as the law of the land, that this writ is prosecuted.

Trusting the Court will not further delay a decision of the important question presented in this record, we submit the cause, with the hope that this mo-

tion may be denied, and that the cause be submitted and heard upon its merits.

Respectfully,

ROBERT B. SMITH, and

ROBERT L. WORD.

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